INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Reasons for granting the writ	8
Conclusion	20

CITATIONS

Cases:

Aronberg v. *Federal Trade Commission*, 132 F. 2d 165	12
Charles of the Ritz Distributors Corp. v. *Federal Trade Commission*, 143 F. 2d 676	12
Dorfman, et al. v. *Federal Trade Commission*, 144 F. 2d 737	12
Federal Trade Commission v. *Standard Education Society*, 302 U. S. 112	10, 12
Florence Mfg. Co. v. *J. C. Dowd & Co.*, 178 Fed. 73	11
Gulf Oil Corp. v. *Federal Trade Commission*, 150 F. 2d 106	12
Jordan v. *DeGeorge*, 341 U. S. 223	18
P. Lorillard v. *Federal Trade Commission*, 186 F. 2d 52	12
Prudential Ins. Co. v. *Faulkner*, 68 F. 2d 676	19-20
Stanley Laboratories, Inc. v. *Federal Trade Commission*, 138 F. 2d 388	12
United States v. *Dotterweich*, 320 U. S. 277	14, 16
United States v. *El-O-Pathic Pharmacy, et al.*, decided June 18, 1951, C.A. 9	10, 11
United States v. *Lexington Mill & Elevator Co.*, 232 U. S. 399	13
United States v. *62 Packages * * * Marmola Prescription Tablets*, 48 F. Supp. 878, affirmed, 142 F. 2d 107, certiorari denied *sub nom. Raladam Co.* v. *United States*, 323 U. S. 731	10-11
United States v. *Petrillo*, 332 U. S. 1	18
United States v. *Sullivan*, 332 U. S. 689	17, 18
Williams v. *United States*, 341 U. S. 97	18

Statute:

Federal Food, Drug and Cosmestic Act of 1938, 52 Stat. 1040, as amended by the Act of June 24, 1948, 62 Stat. 582, 21 U.S.C. 301, *et seq.*:	
Sec. 304	3
Sec. 402(b)(4)	2, 4, 13
Federal Trade Commission Act, as amended, 15 U.S.C. 52, 55(a)	12

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 274

UNITED STATES OF AMERICA, PETITIONER

v.

88 CASES, ETC., "BIRELEY'S ORANGE BEVERAGE", GENERAL FOODS CORPORATION, CLAIMANT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered March 23, 1951, vacating a decree of condemnation against the respondent product.

OPINION BELOW

The opinion of the Court of Appeals (III R. 481-490)[1] is reported at 187 F. 2d 967.

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[1] The printed record consists of the appendices to the briefs filed in the Court of Appeals. The appendix to the Libellant's (Government's) brief, in two volumes paginated consecutively,

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1951 (III R. 491). Petitions for rehearing by both sides (III R. 499-523) were denied on May 28, 1951 (III R. 524). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 402(b)(4) of the Federal Food, Drug and Cosmetic Act provides in pertinent part that a food shall be deemed to adulterated "if any substance has been added thereto or mixed or packed therewith so as to * * * make it appear better or of greater value than it is." The libel charged that the respondent product was adulterated within the meaning of this section in that it consisted of a small quantity of concentrated citrus juice mixed with and added to yellow coal tar dyes, water, sugar, lactic acid, and orange oil, so as to make the food look, taste and smell like orange juice or a beverage containing a large quantity of orange juice. The questions are:

1. Whether the protection of the Food, Drug and Cosmetic Act extends, as the court below held, only to the ordinary consumer who has and exercises a normal measure of the laymen's common sense and judgment, or whether, as other Courts of

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will be designated I R. and II R., respectively, and the appendix to claimant's (respondent's) brief, which now includes the proceedings in the Court of Appeals, will be designated III R.

Appeal have held, the Act was designed to protect that segment of the public which includes "the ignorant, the unthinking and the credulous, and those who do not stop to analyze in making a purchase."

2. Whether Section 402(b)(4) applies to a food having a deceptive appearance as to the quantity of its most valuable ingredient (orange juice) but which is not necessarily confused with another and superior food, in this case 100 per cent orange juice.

3. Whether, in the circumstances of this case, the Court of Appeals erred in ruling that expert testimony and exhibits to demonstrate the significance of the lack of vitamin C in the respondent product was such shocking and sensational evidence as to require reversal, because the claimant had admitted that the product contained no vitamin C.

STATUTES INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, as amended by the Act of June 24, 1948, 62 Stat. 582, 21 U.S.C. 301, *et seq.*, provides in pertinent part:

> Section 304 [21 U.S.C., Supp. IV, 334]. (a) Any article of food, * * * that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter,

on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

Section 402 [21 U.S.C. 342]. A food shall be deemed to be adulterated—

* * * * *

(b) * * * (4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

STATEMENT

Pursuant to Section 304(a) of the Federal Food, Drug, and Cosmetic Act, the Government brought this action in the District Court for the District of New Jersey to condemn a number of cases of a food labeled "Bireley's Orange Beverage". The libel charged that the food was adulterated within the meaning of Section 402(b)(4)—

(1) In that yellow coal tar dyes had been mixed therewith so as to make the food look like a product composed entirely or in large part of a fresh orange juice and thus better and of greater value than it is.

(2) In that it consisted of a mixture of a small quantity of concentrated citrus juice or juices and water, to which had been added additional water, in excess of that combined in the fresh juices from which the concentrates were made, sugar, lactic acid and orange oil, which substances so added to the said food increased the bulk thereof and gave it the taste and odor of an orange juice or of a bev-

erage containing a large quantity of an orange juice, thereby making the food appear better and of greater value than it is. (III R. 6-8).

"Bireley's Orange Beverage" is a non-carbonated or "still" liquid packed in distinctive bottles of 6¾ ounce capacity. The product is basically greatly diluted orange and lemon juice. Each bottle contains about 6 per cent orange juice and 2 per cent lemon juice, ½ ounce altogether, diluted with almost 6 ounces of water (III R. 47-48, I R. 38-43, II R. 400). To overcome the obvious commercial disadvantages of so weak a mixture, there are added two yellow coal tar colors, sugar, lactic acid and orange oil to make a sweetened, flavored, acidulated, and colored water with the odor and taste characteristics of an orange juice. (III R. 47-48, I R. 38-43, II R. 352, 384, 400).

The drink contains practically no vitamin C, the principal nutrient of citrus juices (I R. 19-20, III R. 59, 63). It was represented, however, as "not an ordinary soft drink" but a "good source of vitamin C." (II R. 431, 432, 440, see also 423-436). At the time of its seizure the drink was distributed not only through the usual channels for soft drinks, but also through dairies which marketed it in ordinary quart milk bottles and in the distinctive smaller-sized bottles shaped to resemble milk bottles, adopted for dairy bottling equipment. (II R. 370-371, 383-386).

The Government also adduced evidence that mothers had purchased this food under the false

impression gained from its appearance that it was orange juice and had fed it to their babies as a dietary source of vitamin C, with the result that the infants developed scurvy, a dietary deficiency disease (III R. 180-186, 191-201, 207, 211, 215-219, 223-251, 281-283, II R. 376, 380-383, 420-421); that extensive surveys among consumers were conducted and that to at least 1522 of the 3539 persons interviewed the article appeared to be a food composed entirely or in large part [2] of orange juice (II R. 401, 404, 407, 410, 412, 417).

The evidence further established that the easily-accomplished elimination of the coal tar dye colors would leave the drink with a very unappetizing, water-like color and without commercial value (I R. 45-49, II R. 387); that the colors were added to give the drink "eye appeal" so as to promote "impulse purchasing" (II R. 386-387, III R. 292-293, 294-295); that the drink has the color of a California Valencia orange and of California Valencia orange juice produced at certain times of the year (I R. 43-45, II R. 340, 382-383, III R. 58); that the orange and lemon pulp contained in the drink give the colored mixture a cloudy appearance commonly associated with citrus juices (II R. 351-352, 383-384); that orange oil was added to simulate the taste of juice as squeezed from oranges (II R. 341-342); and that sugar, lactic acid and orange oil impart to the 87 per cent of water in the drink

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[2] More than 25 per cent orange juice.

the taste and odor characteristics of an orange juice (I R. 41-43, III R. 47-48, 207).

The product was promoted by advertising claims that each bottle contained the juice of a whole orange (II R. 436), and that it had nutritional value comparable to orange juice (II R. 431, 432, 436, 437, III R. 297-298, 301-302).[3]

The evidence also showed that orange juice is generally recognized as one of the most important foods for supplying vitamin C, and for that reason is extensively recommended and used for its dietary value, particularly in infant feeding. (I R. 61, II R. 235, III R. 178.)

The case was tried before a jury, and a verdict for the Government was returned (III R. 470). Upon appeal, the Court of Appeals for the Third Circuit reversed upon the grounds (1) that the trial court erred in instructing the jury that it was their function "to determine whether any part of the public, the vast multitude which includes the ignorant, the unthinking and the credulous, and those who do not stop to analyze in making a purchase would be" misled as to the amount of orange juice in the respondent product; (2) that in order to prove a violation of Section 402(b)(4) the Gov-

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[3] "Made from the concentrated juice of fresh oranges with only water and sugar added" (II R. 431); "Provides real fruit nutrition", "No artificial flavoring" (II R. 432); "A beverage with nutritional value", "A refreshing, nourishing drink", "The refreshing quencher made of oranges" (II R. 436); "Enjoy real fruit nutrition" (II R. 437). [Underscoring in original.] All of these statements are untrue or misleading.

ernment must show that the consumer is likely to confuse the product with a specified superior counterpart, i.e., undiluted orange juice, and that the charge to the jury, which permitted comparison also with beverages composed in large part of orange juice, failed to submit the case on such basis; and (3) that the trial court erred in admitting evidence of the results of experiments in feeding guinea pigs, and evidence showing the development of scurvy in children who drank the respondent product instead of orange juice (III R. 481-490).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals held that the correct standard as to deception is not "whether any part of the public, the vast multitude which includes the ignorant, the unthinking and the credulous, and those who do not stop to analyze in making a purchase would be" misled, as the trial court charged (III R. 456), but the "reaction of the ordinary consumer under such circumstances as attended retail distribution of this product." The court explained that "when a statute leaves such a matter as this without specification, the normal inference is that the legislature contemplated the reaction of the ordinary person who is neither savant nor dolt, who lacks special competency with reference to the matter at hand but has and exercises a normal measure of the layman's common sense and judgment." The opinion goes on to explain that

"what constitutes the norm of common sense and judgment is peculiarly the province of the jury to decide by relating common experience in the conduct and reaction of people to the circumstances at hand and by weighing such evidence as may be offered of the actual reactions of numbers of ordinary people in similar circumstances." (III R. 484.)

If the Court of Appeals had criticized the charge merely on the ground that the phrase "any part of the public" permitted consideration of the effect upon any insignificant part of the public—*de minimis*—as distinct from a substantial portion, the question would be whether the charge as a whole would be so understood by the jury.[4] But the court below went further. In holding that the test of deception to be applied is the reaction of the ordinary person or ordinary consumer, the court, contrary to the decisions of other courts (see pp. 10-13, *infra*), has ruled out the ignorant, the unthinking and the credulous, whether or not they form a substantial portion of the public, if they are below the "norm of common sense and judgment". The court holds, in effect, either that the "ordinary consumer" does not include ignorant, unthinking and credulous persons, or that

[4] Shortly after the passage in question the trial judge instructed the jury that the Government sought to show "the impression to many of the public", although no proof of deception to any particular number or percentage of persons was required (III R. 457). In fact, the evidence shows that a very substantial part of the public is deceived.

Congress did not intend the Act to protect them.

The standard enunciated by the court below, if permitted to stand, would result in depriving substantial segments of the population of protection from unscrupulous vendors who do not hesitate to do an illicit business in adulterated and misbranded foods and drugs. It would mean that the statute does not protect against practices that would deceive perhaps 40 per cent of the population who are on the below-average side. Such a restrictive standard was not intended by Congress. Rather, it was the Congressional purpose to protect all substantial segments of the consuming public, which includes those who are educated and intelligent, those with a normal measure of the layman's common sense and judgment, and those who are ignorant, unthinking and credulous. The credulous, of course, are not necessarily dolts or unintelligent; they may merely be unsuspicious or trusting, or unaware of modern methods of food fabrication. Cf. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112.

The decision below on this aspect of the case cannot be reconciled with the test as to deception expressed in *United States* v. *62 Packages* * * * *Marmola Prescription Tablets,* 48 F. Supp. 878 (W.D. Wis.), affirmed, 142 F. 2d 107 (C.A. 7), certiorari denied *sub nom. Raladam Co.* v. *United States,* 323 U.S. 731, and *United States* v. *El-O-Pathic Pharmacy et al.,* C.A. 9, decided June 18, 1951. Both cases involved misbranding of drugs

alleged to be dangerous to health. In the former case the district court (p. 887), and in the latter case the Court of Appeals for the Ninth Circuit, stated in their opinions, in substantially the language in the charge in this case, that the purpose of the Food, Drug and Cosmetic Act is

> to protect the public, the vast multitude which includes the ignorant, the unthinking, and the credulous who, when making a purchase, do not stop to analyze.

The language in the instruction which the court below held erroneous originated in the opinion of the Court of Appeals for the Second Circuit in *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 Fed. 73, which involved the question whether selling a tooth brush under a certain trademark constituted a deceptive competitive practice. The opinion stated that (p. 75):

> the courts look with suspicion upon one who, in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them. The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.

This rule and the standard thus stated has been adopted and restated in at least three cases in courts of appeals involving trademarks and mis-

leading advertising with respect to drugs and cosmetics, which were brought under the 1938 amendments of the Federal Trade Commission Act. *Aronberg* v. *Federal Trade Commission,* 132 F. 2d 165, 167 (C.A. 7); *Stanley Laboratories, Inc.* v. *Federal Trade Commission,* 138 F. 2d 388, 392-393 (C.A. 9); *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 679 (C.A. 2). The same standard has also been adopted and restated in other courts of appeals in Federal Trade Commission Act cases not involving drugs or cosmetics. E.g., *Dorfman, et al.* v. *Federal Trade Commission,* 144 F. 2d 737, 739 (C.A. 8); *Gulf Oil Corp.* v. *Federal Trade Commission,* 150 F. 2d 106, 109 (C.A. 5); *P. Lorillard* v. *Federal Trade Commission,* 186 F. 2d 52, 58 (C.A. 4). See also *Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112.

The 1938 amendments of the Federal Trade Commission Act were enacted as a companion measure to the Federal Food, Drug, and Cosmetic Act of 1938. These amendments prohibit the dissemination of an advertisement to induce the purchase of a food, drug, device or cosmetic which is misleading in a material respect (15 U.S.C. 52, 55(a)). It is evident that the purpose of the 1938 amendments of the Federal Trade Commission Act is identical with the purpose of the Federal Food, Drug, and Cosmetic Act to prevent deception of consumers. It follows that the scope of protection of consumers against deception is identical in the two acts. Thus

the test of deception of consumers expressed by the court below is inconsistent with the opinions of the Courts of Appeals for the Second, Fourth, Fifth, Seventh, Eighth and Ninth Circuits in Federal Trade Commission Act cases.

Further support for our position that Section 402(b)(4) was not intended to be limited to protecting the "ordinary consumer" or the "ordinary person," in the narrow sense that the opinion below indicates, is found in the decision of this Court in *United States* v. *Lexington Mill & Elevator Co.*, 232 U.S. 399. The question in that case concerned the correct interpretation of that part of the definition of an adulterated food in the Federal Food and Drugs Act of 1906 which stated that a food is adulterated if it contains a poisonous or deleterious ingredient which may render it injurious to health. This Court said that the flour involved in that case (p. 411)—

> may be consumed, when prepared as food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or deleterious ingredient, may possibly injure the health of *any of these,* it shall come within the ban of the statute. [Italics supplied.]

This decision must be taken to mean that the strong, the weak, the old, the young, the well and the sick, all must be included in addition to the "ordinary person" or "ordinary consumer" in the protection intended to be afforded by the Act. The

present statute certainly was not meant to be narrower in the protection afforded the public than its predecessor. *United States* v. *Dotterweich,* 320 U.S. 277, 282.

We submit that the question as to the portion of the public which must be shown to be misled is a very important one in the enforcement of the Food, Drug and Cosmetic Act, and that, in view of the difference between the approach taken by the court below and that taken by other courts, the issue should be resolved by this Court.

2. The libel alleged (III R. 6-7) and the charge to the jury repeatedly stated (III R. 437, 438, 455-456, 457-458) that Section 402(b)(4) would be violated if persons thought that "Bireley's Orange Beverage" was composed entirely or *"in large part"* of fresh orange juice. The Court of Appeals held, however, that there would be no adulteration so long as the ordinary consumer did not believe the beverage was composed *entirely* of orange juice. This holding was required, the court said, because to interpret the statute to apply to a food having a deceptive appearance as to the quantity of one of its valuable ingredients, but not likely to be mistaken for another and superior food, would raise serious difficulties of vagueness. The court said:

> * * * proof of violation of the statute requires first description and definition of the superior counterpart, and second, proof that the consumer is likely to mistake the inferior for the superior. [III R. 486.]

"A beverage containing a large quantity of orange juice" (III R. 7), as described in the libel, seems clearly to be a "superior counterpart" to a beverage containing a small part of orange juice. But in any event, we believe that the proper test is what the food actually is and whether its outward appearance reflects its true composition. Here the food contains only 6 per cent orange juice, but the proof showed and the jury obviously found that substances had been added to give it the deceptive appearance of being composed entirely of fresh orange juice or of containing a large quantity of fresh orange juice. If the product, by the addition of artificial ingredients, was made so to resemble orange juice that the consumer would be led to believe that it contained more orange juice than it did, it was made to appear better and of greater value than it is and the statute was violated. The District Court's charge stated a reasonably definite standard for the application of Section 402(b)(4).

On the other hand, the Court of Appeals' requirement of proof of confusion with undiluted orange juice would in a large measure nullify the protection of consumers intended by Section 402 (b)(4). To a great many consumers, as shown by the record, the respondent product appears to consist of a substantial amount of orange juice, ranging from 25 to 100 per cent. That this is no mere accident is shown by the proof that ingredients were added so as to make the product simulate

orange juice in taste, appearance, and odor, and the further proof as to merchandising methods used and the references to orange juice in the advertising claims. The court below conceded that "literally the product appears better than it is if it appears to the consumer to contain more than 6% orange juice" (III R. 485). Under the instructions of the trial court, the jury found that the product appeared to be composed entirely or in large part of fresh orange juice. Surely, then, it was made to "appear better or of greater value than it is," within the proscription of Section 402(b)(4). Since, as the proof showed and the jury found, the product was designedly foisted upon substantial numbers of consumers as a food containing largely orange juice, the claimant is hardly in a position to insist that the statute requires, as a condition of condemnation, that its product be compared with undiluted orange juice and proof of confusion with such juice. Cf. *United States* v. *Dotterweich, supra.*

Such a requirement would permit economic adulteration, in such cases as this, so long as the consumer is not deceived into thinking that he is buying the pure article. We think this is an unreasonable restriction upon the plain terms of Section 402(b)(4). It categorically forbids economic adulteration whereby a food is made to appear better or of great value than it is. It is aimed at the very practices this record discloses—the dilution of valuable foods and the substitution of other

worthless, albeit harmless, ingredients. Where, as here, the product contains only an insignificant proportion of its only valuable constituent, it is not unreasonable to the manufacturer to hold him to acount when he has successfully deceived substantial numbers of consumers into thinking that the product is composed in large part of that constituent. In the circumstances of this case, the test of consumer deception adopted by the District Court does not, as the Court of Appeals thought (III R. 485-486), place an unreasonable burden on the manufacturer to speculate on consumer judgment as to the exact percentage of a valuable food his product contains.

The court below was concerned with the indefiniteness of the statute if construed so as to permit comparison with anything but a defined food such as pure orange juice, and for that reason prohibited comparison with a product containing pure juice "in large part". Of course, "extreme possible applications" (*United States* v. *Sullivan,* 332 U.S. 689, 694) can be imagined in which it might be difficult to draw a line. But the hypothetical "guess whether an artificial beverage contains five, six, seven, or some other percentage of orange juice" (III R. 485-486) is not required in this case and probably never will be in any other. Compare *United States* v. *Sullivan,* at 694. There is no difficulty in determining that a beverage containing six per cent orange juice is not composed "in large part" of orange juice. The possibility of hard bor-

derline situations does not make a statute too vague or illusory (*Jordan* v. *DeGeorge,* 341 U.S. 223, 231; *Williams* v. *United States,* 341 U.S. 97, 101; *United States* v. *Petrillo,* 332 U. S. 1, 7),[5] or justify a restrictive interpretation which will prevent application of the statute in clear cases (*United States* v. *Sullivan,* 332 U.S. 689, 693-694).

3. The Court of Appeals held that the trial court erred in admitting evidence showing the harmful effects of a deficiency of vitamin C in the diet. The evidence consisted of (1) the testimony of an expert who had conducted tests upon guinea pigs with orange juice and with "Bireley's Orange Beverage," (2) photographs of the subjects, and (3) testimony showing the development of scurvy in children who drank the Bireley product. The purpose of this evidence was to demonstrate the nutritional superiority of orange juice over "Bireley's Orange Beverage" in order to support the charge in the libel that the Bireley product appeared to be better or of greater value than it is. This was relevant and could be shown by expert testimony or by actual demonstration or experiments which might be more effectual. The Court of Appeals concedes that this evidence was relevant, but it holds the evidence should have been excluded because of its "sensational and shocking nature."

A trial court, in the exercise of a sound discre-

[5] "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." [332 U.S., at 7.]

tion, must determine whether the probative value of proffered evidence outweighs the risk that its admission will confuse, mislead, shock or unduly prejudice the jury. The trial court in the present case weighed the competing considerations in passing on the question of relevance (III R. 64-66), and determined that the evidence pertaining to scurvy was admissible. Only if it was clearly wrong was the court's ruling reversible.

The record also reveals (III R. 64) that the trial court gave careful consideration to the objection made to the introduction of the pictures of the guinea pigs. The court explained why it decided that evidence relating to the vitamin C content of the seized food was material. It stated that, as part of the issue whether the food appeared to be of greater value than it actually is, it was incumbent upon the Government to show the value of the food. The court pointed out (III R. 65) that, despite the concession on the part of claimant's counsel that there was no vitamin C in the food, the Government was entitled to offer formal proof of the significance of this fact.

Thus, there is no question as to the relevance of this evidence. The mere fact that it might be considered "sensational and shocking" does not call for its automatic exclusion. The principle that relevance, and not the character of the relevant evidence, is the guide to its admissibility was recognized in *Prudential Ins. Co.* v. *Faulkner,* 68 F. 2d 676, 678 (C.A. 10). There the court said:

> The true test of admissibility of testimony in a situation similar to the one presented here is its relevancy and materiality. Testimony pertinent to a material issue will not be excluded merely because it may have a prejudicial effect on the opposing party or may arouse the jury. * * * (citing cases)

The admission of such evidence is left to the court's sound discretion. Certainly, once the trial court determines that the evidence has value, an appellate court should not reverse because it considers the trial court's estimate of the effect of the evidence wrong.

The ruling of the Court of Appeals on this point presents a dilemma. The Government had the burden of demonstrating the significance of the adulteration of the food to the jury. Ordinarily, jurors have no common knowledge of the purpose of vitamin C in the diet or the consequences of a dietary deficiency of vitamin C. But the showing of the significance of the adulteration risks reversal on appeal if too well presented.

CONCLUSION

For the reasons stated, we respectfully submit that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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15

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IN THE

Supreme Court of the United States

October Term, 1951.

No. 274.

UNITED STATES OF AMERICA,
Petitioner,

v.

88 CASES, ETC., "BIRELEY'S ORANGE BEVERAGE"
GENERAL FOODS CORPORATION,
Claimant.

RESPONDENT'S REPLY AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

HENRY S. DRINKER
117 So. 17th Street,
Philadelphia 3, Pa.,
Counsel of Record for Respondent.

LESTER E. WATERBURY,
250 Park Avenue,
New York 17, N. Y.,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

TABLE OF CONTENTS OF BRIEF.

	Page
Opinion Below	1
Reasons for Denying Petition	1
Statement	21
Conclusion	26

TABLE OF CASES CITED.

	Page
Allen v. Stokes (1940) 260 App. Div. (N. Y.) 600....	20
Berger v. United States (1935) 295 U. S. 78 (p. 88)...	21
Florence Manufacturing Company v. J. C. Dowd & Co. (1910) 178 Fed. 73 (C. C. A. 2)	7
Gaynor v. Atlantic Greyhound Corp. (1949) 86 F. Supp. 284 (D. C. Pa.)	23
Launikitas v. Wilkes-Barre Traction Co. (1913) 241 Pa. 458, 88 Atl. 703	23
McGlothan v. P. R. R. (1947) 72 F. Supp. 176 (D. C. Pa.)	23
Moyer v. Aetna Life Ins. Co. (1942) 126 F. (2d) 141 (C. C. A. 3)	23
Prudential Insurance Company v. Faulkner (1934) 68 F. (2d) 676 (C. C. A. 10)	20
Rost v. Brooklyn Heights R. R. Co. (1896) 10 App. Div. (N. Y.) 477	20
Selleck v. City of Janesville (1899) 104 Wis. 570...	20
U. S. v. Cataldo (1946) 157 F. (2d) 802 (C. C. A. 1)...	8
U. S. v. El-O-Pathic Pharmacy (1951) F. (2d) , 1 CCH F. D. C. Law Rep. ¶ 7206 (C. A. 9)	7
U. S. v. 9 Bottles [Colusa Natural Oil] (1947) 78 F. Supp. 721 (D. C. Iowa), affirmed sub nom. Colusa Remedy Co. v. U. S. (1949) 176 F. (2d) 554 (C. A. 8), cert. denied (1950) 338 U. S. 911	8
U. S. v. 116 Boxes [Arden Assorted Candy Drops] (1948) 80 F. Supp. 911 (D. C. Mass.)	8
U. S. v. Pinaud, Inc. (1947) 1 CCH F. D. C. Law Rep. § 7108 (D. C. N. Y.)	8
U. S. v. Sekov Corporation (1943) K & D 448 (D. C. Calif.)	9
U. S. v. 70½ Dozen Bottles ["666"] (1942) K & D 89 (D. C. Georgia)	9

TABLE OF CASES CITED (Continued).

	Page
U. S. v. 62 Packages [Marmola Prescription Tablets] (1943) 48 F. Supp. 878 (D. C. Wis.), affirmed (1944) 142 F. (2d) 107 (C. C. A. 7), cert. denied sub nom. Raladam Co. v. U. S. (1944) 323 U. S. 731	2, 6
U. S. v. Sullivan (1947) 332 U. S. 689	2
U. S. v. 30 Cases [Leader Brand Strawberry Fruit Spread] 93 F. Supp. 764 (D. C. Iowa)	7
U. S. v. 2 Boxes [Poppy Seeds] (1945) 147 F. (2d) 123 (C. C. A. 6)	2

STATUTES AND AUTHORITIES CITED.

Page

1950 Census of Population, Preliminary Reports, Series P-C No. 3, Bureau of the Census (Government Printing Office, Washington, 1950), p. 8 ... 2

1 CCH F. D. C. Law Rep. ¶ 3034 18

21 CFR:

§ 1.10(e)(1) 9
§ 1.105(c)(1) 9
§ 1.105(f)(1) 9
§ 1.12(c) and (d) 9
§ 1.203(a)(1) 9
§ 1.9(a)(1) and (2) 9

39 Col. L. Rev. 259 (February 1939) 24

Consumer and Opinion Research, by Albert B. Blankenship (Harper & Brothers, New York, 1943)... 26

Cong. Rec. Nov. 26, 1945 (Vol. 91, No. 208) pp. A5488-A5490 (Speech of Hon. B. Carroll Reece) 24

1 Encyc. Brit. (1942) 224 14

Federal Food, Drug, and Cosmetic Act, by Charles Wesley Dunn (G. E. Stechert & Co., New York, 1938) 12, 14

Federal Food, Drug, and Cosmetic Act: 1938-1949, by Vincent A. Kleinfeld and Charles Wesley Dunn (Commerce Clearing House, Inc., New York, 1949) 9

Federal Food, Drug, and Cosmetic Act of June 25, 1938 (21 U. S. C. 301, et seq.):

§ 301(a) 3
§ 301(b) 3
§ 301(c) 3
§ 301(d) 3
§ 401 .....14, 18
§ 402(a) 3

STATUTES AND AUTHORITIES CITED (Continued).

	Page
§ 402(b)	9
§ 402(b)(4)	5, 11
§ 403(d)	8
§ 403(f)	4
§ 502(c)	4
§ 602(c)	4
§ 701	18
§ 701(a)	9
Food and Drugs Act of June 30, 1906, 34 Stat. 768, 21 U. S. C. (1934 ed.) § 1 et seq.	5
Food and Drug Administration Service and Regulatory Announcements: F. D. C. No. 2, Rev. 1	14
Food Field Reporter, October 11, 1948, p. 46	18
Gauging Public Opinion, by Hadley Cantril (Princeton University Press, Princeton, 1944)	26
A Guide to Public Opinion Polls, by George Gallup (Princeton University Press, Princeton, 1948)	26
How to Conduct Consumer and Opinion Research, Edited by Albert B. Blankenship (Harper & Brothers, New York, 1946)	26
Interpretation, § 201, Art. 17, Agriculture and Markets Law (New York), July 1950, Ch. 48, Laws of 1922, as Amended	16
Memorandum, Bureau of Foods, Drinks and Hotels, Department of Health (Kentucky), May 15, 1936, Citing Definition of Orangeade, January 1932	16
National Bottlers' Gazette, Vol. 68, No. 815 (January 1950), p. 17	18
Official Bulletin, Beverage Law and Regulations, Department of Health (New Hampshire), 1949, Regulations Nos. 11(e) and 12, pp. 14 and 18	16
Official Bulletin, Definitions-Identity, Beverages and Beverage Materials, Department of Agriculture (North Carolina)	16

STATUTES AND AUTHORITIES CITED (Continued).

Page

Official Bulletin, Division of Foods and Dairies, Department of Agriculture (Ohio), Regulation No. 211(b) 16

Official Bulletin, Orange Drinks, Bureau of Foods and Standards, Department of Agriculture (Michigan) 16

Official Bulletin, Rules and Regulations, Food Commissioner and Chemist, State Laboratories (North Dakota), May 15, 1950, Regulation Nos. 17(a) and (b) 16

Official Bulletin, Standards and Definitions and Rules and Regulations, Bureau of Food, Department of Agriculture (Minnesota), January 1949, Regulations Nos. 4(c) and (i), p. 148 16

Official Bulletin, Title 2, Department of Agriculture, Bureau of Foods and Chemistry (Pennsylvania), Chapter XVI, No. 1618 15

Official Bulletin, Title 2, Department of Agriculture, Bureau of Foods and Chemistry (Pennsylvania), Chapter XVI, No. 1619 15

Official Bulletin, Title 2, Department of Agriculture, Bureau of Foods and Chemistry (Pennsylvania), Chapter XVI, No. 1620 15

Preventing Economic Adulteration of Food, by Daniel P. Willis, 1 Food Drug Cosmetic Law Quarterly 20 (March 1946) 17

Regulation, Chemical Division, Department of Agriculture (Florida) 16

Statistical Abstract of the United States: 1950. Bureau of the Census (Government Printing Office, Washington, 1950), p. 30 and p. 115 2

Statistical Handbook of Agriculture in the United States (Bureau of Agricultural Economics, June, 1951), p. 13 3

STATUTES AND AUTHORITIES CITED (Continued).

	Page
Statistics on the Blind, by Ralph G. Hurlin, in Outlook for the Blind (Published by The Foundation for the Blind, Inc., New York), March, 1947	2
Supreme Court of the United States Rules:	
Rule 27(4)	21
Rule 38(5)	10, 27
Rule 38(5)(b)	19
15 U. S. C. §§ 52-55	24
21 U. S. C. (1934 ed.) § 8	5
Wheeler-Lea Act of March 21, 1938, 52 Stat. 111	24
The World Almanac and Book of Facts: 1950 (New York World-Telegram and The Sun, New York, 1950), p. 846	3